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{SHOW } PROCEEDINGS AND ORDERS DATE: 020485

CASE NBR 84-1-00049 CSY
SHORT TITLE Sweat, Russell, et al. DOCKETED: Jul 11 1984
VERSUS Arkansas

Date	Proceedings and Orders
Jul 11 1984	Petition for writ of certiorari filed.
Aug 3 1984	Waiver of right of respondent Arkansas to respond filed.
Aug 8 1984	DISTRIBUTED. September 24, 1984
Sep 5 1984	Response requested. (Due October 5, 1984 - NONE RECEIVED)
Sep 24 1984	Order extending time to file response to petition until October 19, 1984.
Oct 19 1984	Brief of respondent Arkansas in opposition filed.
Oct 24 1984	REDISTRIBUTED. November 9, 1984
Nov 13 1984	REDISTRIBUTED. November 21, 1984
Nov 14 1984	Record requested.
Nov 26 1984	REDISTRIBUTED. November 30, 1984
Nov 26 1984	Record filed.
Nov 26 1984	Certified original record & C.A. proceedings recived.
Dec 3 1984	REDISTRIBUTED. December 7, 1984

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 020485

CASE NBR 84-1-00049 CSY
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VERSUS Arkansas

Date	Proceedings and Orders
Dec 10 1984	REDISTRIBUTED. January 4, 1985
Jan 7 1985	REDISTRIBUTED. January 11, 1985
Jan 14 1985	Petition DENIED. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. Justice Powell OUT.

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PETITION FOR WRIT OF CERTIORARI

No. 84-49

Office-Supreme Court, U.S.
FILED
JUL 11 1984
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1984

Russell Sweat and
Richard "Bud" Sweat ..... *Petitioners*

V.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT AND
THE ARKANSAS COURT OF APPEALS

BRIEF FOR PETITIONERS IN SUPPORT OF PETITION

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QUESTION PRESENTED FOR REVIEW

I.

MAY INCULPATING STATEMENTS MADE BY AN INDICTED DEFENDANT IN THE ABSENCE OF COUNSEL BE USED AGAINST THAT DEFENDANT IF THE STATEMENTS WERE SURREPTITIOUSLY TAKEN BY A POLICE OFFICER WHO KNEW DEFENDANT HAD BEEN FORMALLY CHARGED BUT NOT YET ARRESTED?

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OPINION BELOW

The decision of the Arkansas Court of Appeals was rendered on April 11, 1984. Petitioners' Motion for Review to the Arkansas Supreme Court was denied on May 14, 1984.

JURISDICTION

The basis for this Court's jurisdiction to review the decision by Petition for Writ of Certiorari is conferred by Rule 17, Rules of the Supreme Court of the United States. The present Petition is presented within sixty days of the May 14, 1984, denial of the Petition for Review by the Arkansas Supreme Court and is, therefore, timely filed in accordance with the rules of this Court.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

The present case involves the Sixth Amendment right to assistance of counsel.

STATEMENT OF CASE

The petitioners were convicted by a jury on April 18, 1981, and each was sentenced to a term of five years imprisonment and fined $10,000. The conviction arose from a charge of conspiracy to possess a controlled substance with intent to deliver.

At the trial of the cause, counsel for petitioners objected to the introduction of video tape recordings of conversations with petitioners taken by police authorities after the filing of a Felony Information by the Prosecuting Attorney against petitioners. Petitioners' objection to the introduction of this evidence was overruled by the trial court and a judgment of conviction entered.

On June 30, 1982, the Arkansas Court of Appeals rendered an opinion reversing petitioners' conviction and ordering a new trial. The Arkansas Court of Appeals' opinion upheld the trial court's decision in admitting the video recordings but reversed on other grounds not pertinent hereto.

This matter was re-tried and on June 28, 1983, the petitioners were convicted by a jury and each was sentenced to a term of five years imprisonment and fined $10,000.

Objection was made by petitioners at the second trial to the introduction by the State of Arkansas of the video tape recordings made after the filing of the Felony Informationn. This objection was once again overruled by the trial court.

On April 11, 1984, the Arkansas Court of Appeals affirmed petitioners' convictions and rejected petitioners' argument that the video taped statements taken after indictment should be suppressed.

The timing of the taking of the questioned video tapes is undisputed. At Noon on March 27, 1980, an officer of the Arkansas State Police met with the Prosecuting Attorney and prepared the Affidavit which supported a formal Felony Information. At 4:30 p.m. on March 27, 1980, petitioners were charged by Felony Information and warrants were issued for their arrest. The Arkansas State Trooper was aware of the filing of the Felony Information and of the issuance of the arrest warrants.

Between the hours of 5:15 p.m. and approximately 7:00 p.m. on March 27, 1980, this same police officer surreptitiously took video taped statements from the defendants. The petitioners had no knowledge their conversation with the police officer was being recorded and the video tapes were subsequently introduced at both trials over objections of petitioners.

REASONS FOR GRANTING THE WRIT

Rule 17 of the Rules of the United States Supreme Court sets out the considerations governing review on certiorari. Among such considerations are: . . . (b) when a State court of last resort has decided a federal question in a way in conflict with the decision . . . of a federal court of appeals and (c) when a State court . . . has decided an important question of federal law . . . in a way in conflict with applicable decisions of this Court. Petitioners submit that the question presented herein merits review by this Court. The opinion rendered by the Arkansas Court of Appeals and the opinion on which review was refused by the Arkansas Supreme Court is in direct conflict with the spirit and intent of this Court's decisions in *Massiah v. U.S.*, 84 S.Ct. 1199 (1974), 377 U.S. 201, 12 L.Ed.2d 246, and *U.S. v. Henry*, 100 S.Ct. 2183 (1980), 447 U.S. 264, 65 L.Ed.2d 115, as well as the decision of the United States Court of Appeals, Fifth Circuit, in *U.S. v. Anderson*, 523 F.2d 1192 (1975).

Petitioners further submit that the *Massiah* safeguards apply when a defendant has had charges formally filed against him but has not yet been arrested and subsequent statements are surreptitiously elicited by law enforcement officers having direct knowledge that criminal charges have been filed.

The Arkansas Court of Appeals did not agree with this contention and stated in their Opinion as follows: (See Appendix "A". p. A-5).

> "Secondly, in support of this point, appellants argue that their constitutional rights were violated in that all statements were made without counsel present and without adequate warning of their rights, citing *Massiah v. United States*, 377 U.S. 201 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964). First of all, we note that one is not entitled to notification of his rights when the person has not been arrested or deprived of his freedom

> in any significant way. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Parker v. State*, 258 Ark. 880, 529 S.W.2d 860 (1975). Since no interrogation of appellants took place and they were not coerced or tricked into saying anything against their will, it was not error for the trial judge to refuse to suppress appellants' statements."

See *Hoffa v. United States*, 385 U.S. 293 (1966). *Sweat v. State*, 5 Ark. App. 284, 635 S.W.2d 296 (1982).

A careful reading of *Hoffa* reveals the language the Arkansas appellate court relied on in rendering their decision. The language of this Court espoused was:

> "Nothing in *Massiah*, in *Escobedo*, or in any other case that has come to our attention, even remotely suggests this novel and paradoxical constitutional doctrine, and we decline to adopt it now. There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction."

Hoffa, supra, at page 310.

Hoffa is readily distinguishable from the instant case. First, the statements attributable to the defendant in *Hoffa* were for a separate and distinct offense than that originally charged; jury tampering as opposed to violating a provision of the Taft-Hartley Act. Secondly, the police were not required in the instant case to guess at the precise moment they had probable cause to arrest the appellants. In this case a formal Information had already been filed by the Prosecuting Attorney and arrest warrants issued. In fact, the

preparation of the Information charging the appellants was made with the assistance of the Arkansas State policeman who subsequently surreptitiously elicited the inculpating statements.

The question presented herein is novel to the extent that it appears to fall somewhere in the middle of the holdings of this Court in *Massiah* and *Hoffa*. *Massiah* involved statements taken from a defendant who had been indicted, arrested and retained counsel. The statements in *Massiah* related to the offense with which the defendant was charged. In *Hoffa*, the defendant had been indicted and had retained counsel and the statements made by him formed the basis of a new and separate criminal offense.

The instant case involves a simple fact situation where the defendants had been indicted but not yet arrested. The statements elicited from the petitioners were by a police officer who knew full well formal charges had been filed. The statements taken related directly to the offense charged and arguably formed the substantial basis for petitioners' conviction.

Does *Massiah* extend to the situation where defendant has been indicted but has not yet been arrested nor retained counsel? Petitioners submit that *Massiah's* broad concern is to protect an indicted defendant from use of incriminating evidence procured from him in the absence of counsel even though counsel had not yet been retained. The defendant should be entitled to aid of counsel from indictment to time of trial. To hold otherwise would be to give police officers a license to surreptitiously elicit evidence from an indicted defendant who had not yet been arrested or arraigned.

Petitioners submit that the holding of the Arkansas Court of Appeals and the denial of review by the Arkansas Supreme Court are in conflict with decisions of this Court, as well as decisions of the United States Court of Appeals.

Fifth Circuit. Petitioners submit that the question presented should be heard so that all courts can determine the extent of *Massiah* and subsequent decisions.

CONCLUSION

The question presented herein falls squarely within the considerations governing review as set out in Rule 17 of the Rules of the United States Supreme Court. Resolution of the question could have a far reaching effect on the conduct of police officers in the questioning of persons formally charged but not yet arrested. Petitioners submit that for the reasons stated in their brief that the Petition for Writ of Certiorari should be granted and the case accepted for decision.

Respectfully submitted,

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Attorney for Petitioners

CERTIFICATE OF SERVICE

I, Paul Johnson, hereby certify that a copy of the foregoing Brief has been served upon the respondent herein by placing a copy of same in the U.S. Mail, postage paid, addressed to Steve Clark, Attorney General, State of Arkansas, Justice Building, Little Rock, Arkansas 72201, this 10th day of July, 1984.

/s/ Paul Johnson

APPENDIX "A"

ARKANSAS COURT OF APPEALS

No. CA CR 81-164
Opinion Delivered June 30, 1982

Russell Sweat and
Richard "Bud" Sweat
Appellants

V.

State of Arkansas
Appellee

Appeal from Mississippi County
Circuit Court,
Chickasawba District

Honorable Gerald Pearson,
Judge

Reversed and Remanded

LAWSON CLONINGER, Judge

Appellants, Russell Sweat and Richard "Bud" Sweat, were charged by amended information with conspiracy to possess a controlled substance, marijuana, with intent to deliver in violation of Ark. Stat. Ann. § 41-707 (Repl. 1977). After trial, the jury returned a verdict of guilty and they were sentenced to five years imprisonment and a fine of $10,000 for each appellant. Appellants now bring this appeal.

Their first point for reversal is that the trial court erred in refusing to allow evidence of video tapes and audio recordings of conversations of Jimmy Snow with two officers to be presented to the jury. In the winter of 1979-80, Arkansas State Police Officers Earl Rife and John Chappell went to Blytheville to investigate illegal gambling activities. They established an undercover operation there and assumed false identities as barge operators. During the course of the investigation, the officers requested one Jimmy Snow to contact Russell and Bud Sweat for the purpose of selling marijuana. There were several conversations be-

tween Jimmy Snow and the officers at their apartment, and these conversations were recorded. At trial, the state introduced by way of exhibits numerous recorded telephone conversations and video tapes of meetings between the Sweats and Officer John Chappell. Counsel for appellants attempted to introduce evidence of various recorded telephone conversations and video tapes of the police officers and Mr. Snow on the defense of entrapment. The trial judge refused to admit the evidence proffered by the defense on the basis that the conversations were hearsay and therefore, inadmissible. Furthermore the trial judge, pursuant to Rule 611 of the Uniform Rules of Evidence, stated that the playing of the tapes would be a needless consumtion of time and would serve to humiliate Mr. Jimmy Snow.

Uniform Rules of Evidence, Rule 801(d)(2) states:

> A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Statements of a co-conspirator made during a transaction are admissible under this rule. See *Foxworth v. State*, 263 Ark. 549, 566 S.W.2d 151 (1978); *Bosnick v. State*, 248 Ark. 846, 454 S.W.2d 311 (1970). A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. See Black's Law Dictionary; see also Model Penal Code § 5.03.

In the instant case, all of the evidence indicates that Jimmy Snow had no knowledge that Rife and Chappell were

police officers and that he willingly participated in the scheme to sell marijuana to the Sweats. He assisted in introducing the officers to the Sweats and in maintaining communications between them. We hold that Jimmy Snow comes within the definition of a co-conspirator, and therefore his statements are an exception to the hearsay rule. Rule 801(d)(2); *Foxworth v. State, supra.*

The question remains whether the tapes of Snow's conversation with the officers are relevant to the issue of entrapment. Entrapment exists where the criminal designs originate not with the accused, but with the officers of the law, and the accused is lured into the commission of an unlawful act by persuasion, deceitful representation or inducement by the officers. See *Sorrells v. United States*, 287 U.S. 435 (1932); *Peters v. State*, 248 Ark. 134, 450 S.W.2d 276 (1970). Any evidence having any tendency to make the existence of entrapment more probable is admissible, and the accused should be allowed a reasonable latitude in presenting whatever facts and circumstances he claims constitute an entrapment, subject to ordinary rules of admissibility. Rule 401, Uniform Rules of Evidence [Ark. Stat. Ann. § 28-1001 (Repl. 1979)]; *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978). In *Rhoades & Emmerling v. State*, 270 Ark. 962, 607 S.W.2d 76 (Ark. App. 1980) this court held that evidence did not support the defense of entrapment where the initial inducement to commit the offense charged did not come from government authorities. In the instant case, there was evidence to suggest that the initial inducement to commit the offense charged did come from the police officers. Furthermore, conversations which the officers had with Jimmy Snow indicate that the officers used Mr. Snow as a "go-between" with the appellants. It is true that much of the material which is included in the tapes is irrelevant on the issue of entrapment. However, some of the statements made are material and as was stated earlier, any evidence having any tendency to make the existence of entrapment more probable is admissible. *Spears v. State, supra.* Therefore, we hold that it was error for the trial

judge to refuse to allow the video tapes and audio recordings into evidence.

Appellants' second point is that the trial court erred in refusing to permit into evidence certain material which appellants allege was relevant to the defense of entrapment. Specifically, appellants allege that the trial judge erred in refusing to allow into evidence the information, amended information, arrest warrants and memoranda from the police case file regarding a meeting in Little Rock of officers from various police agencies and the United States Attorney's Office. Appellants argue that these materials were essential to their defense of entrapment. Appellants allegedly sought to show that the crime itself was conceived by the officers. Appellants wanted to show that the information had been filed and warrants had been issued prior to the existence of any conspiracy. As was stated earlier, any evidence having any tendency to make the existence of entrapment more probable should be admitted into evidence. See *Spears v. State, supra.* We hold that the information, amended information and arrest warrants were also relevant to the issue of entrapment and therefore, it was an abuse of discretion for the trial judge to refuse to admit them. We have no basis of determining the admissibility or relevancy of the police memoranda, since these materials are not in the record.

Appellants' third point for reversal is that the trial court erred in denying appellants' motion to suppress statements elicited from them after the felony information was filed and the arrest warrants issued. Subsequent to the filing of the felony information and the issuance of the arrest warrants, but prior to the actual arrest of appellants, one of the officers elicited statements from each of the appellants at his apartment. First of all, appellants argue that Officer Chappell's conduct from the filing of the original felony information and the issuance of the arrest warrants constituted entrapment as a matter of law. However, we find that the evidence in the record merely provided a fact question as to whether entrapment was available as a

defense and this is not sufficient to suppress statements made by appellants. See *Peters v. State, supra.*

Secondly, in support of this point, appellants argue that their constitutional rights were violated in that all statements were made without counsel present and without adequate warning of their rights, citing *Massiah v. United States*, 377 U.S. 201 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964). First of all, we note that one is not entitled to notification of his rights when the person has not been arrested or deprived of his freedom in any significant way. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Parker v. State*, 258 Ark. 880, 529 S.W.2d 860 (1975). Since no interrogation of appellants took place and they were not coerced or tricked into saying anything against their will, it was not error for the trial judge to refuse to suppress appellants' statements. See *Hoffa v. United States*, 385 U.S. 293 (1966).

Appellants' final point for reversal is that the evidence was insufficient to support the verdict. We have reversed and remanded this case for a new trial because certain evidence was excluded improperly by the trial judge. Improper exclusion of evidence is a trial error. See *Burks v. United States*, 437 U.S. 1 (1978). We will not review the sufficiency of the evidence question until all relevant evidence has been admitted. See *Vowell v. State*, ____ Ark. App. ____, 628 S.W.2d 599 (March 3, 1982), *rev'd on other grounds*, 276 Ark. 258, ____ S.W.2d ____ (June 1, 1982); see also *United States v. Harmon*, 632 F.2d 812 (9th Cir. 1980).

Reversed and remanded for a new trial.

NOT DESIGNATED FOR PUBLICATION
SEE REVISED SUPREME COURT RULE 21

DIVISION I

ARKANSAS COURT OF APPEALS

No. CACR 83-167

Opinion Delivered April 11, 1984

Russell Sweat and Richard "Bud" Sweat Appellants	Appeal from Mississippi Circuit Court, Chickasawba District
V.	
State of Arkansas Appellees	Honorable Gerald Pearson, Judge

Affirmed

MELVIN MAYFIELD, Chief Judge

This is the second appeal of this case. In the first appeal the appellants' conviction of conspiracy to possess a controlled substance with intent to deliver, in violation of Ark. Stat. Ann. § 41-707 (Repl. 1977), was reversed and remanded. *See Sweat v. State*, 5 Ark. App. 284, 635 S.W.2d 296 (1982). The case was retried, and both appellants were again found guilty and again sentenced to five years imprisonment and a $10,000 fine.

Evidence in the record indicates that officers of the Arkansas State Police went to Blytheville, Arkansas, to investigate a suspected gambling operation. In the course of the investigation they became suspicious of a father and son, Bud and Russell Sweat. Working under assumed identities, the officers solicited help from a real estate salesman, Jimmy Snow, and he became an unwitting informant. Snow introduced the officers to the Sweats and eventually one of the officers negotiated a sale of marijuana to the Sweats.

The undercover officer recorded a number of telephone conversations with each of the Sweats, and also videotaped a visit in his apartment with each of them. He also made recordings of conversations he had with Snow. In the first trial, tapes of the Snow conversations were offered in evidence by the Sweats on their defense of entrapment. The trial court ruled they were hearsay and inadmissible. On appeal we reversed and said Snow came within the definition of a coconspirator and that his statements were admissible as an exception to the hearsay rule under Uniform Evidence Rule 801(d)(2).

In that appeal, the appellants also argued that the trial court erred in allowing into evidence tapes and recordings of the conversations and visits they had with the undercover officer after the information was filed charging them with the crime for which they were convicted. We held, however, that the trial court did not err as the appellants had not been arrested at the time of these conversations and visits, and that appellants were not interrogated, coerced, or tricked into making statements against their will.

In the present appeal, the appellants argue that in the second trial the court erred in refusing to suppress the same tapes and recordings that the court refused to suppress in the first trial. In making his ruling, the judge noted that the same motion had been denied at the first trial, but appellants argued, as they do here, that the issue of whether the taped and recorded statements were custodial and made in absence of counsel was not before the trial court in the first case. We find that the issue was before the trial court in the first trial and that our opinion in the first appeal specifically discussed and decided that issue. *See* 5 Ark. App. at 288. Moreover, under the doctrine of the law of the case, a decision on appeal on any question presented to the trial court "forecloses further consideration of that question in subsequent proceedings in the same case, even though the argument made or ground of objection relied

upon on a second appeal is not identical with the argument made or ground asserted on the first appeal, if the new argument or objection *could have been urged* on the first appeal." *Turner v. State*, 251 Ark. 499, 501, 473 S.W.2d 904 (1971), rev'd. on other grounds, 407 U.S. 366 (1972).

Appellants next argue that the court erred in giving jury instruction AMCI 4007 on their entrapment defense instead of an instruction they proffered. The trial judge is required to give an applicable AMCI instruction unless it does not accurately state the law. *Lampkin v. State*, 271 Ark. 147, 607 S.W.2d 397 (1980); *Conley v. State*, 270 Ark. 886, 607 S.W.2d 328 (1980). It is contended, however, that AMCI is not a complete statement of the law. Appellants point out that the difference between AMCI 4007 and their proffered instruction concerns origination of the criminal design, and they say current case law indicates that an essential element of entrapment is whether the criminal design originated with officers of the law or the accused. In *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978), defense counsel proffered an instruction on entrapment similar to that offered by appellants. The court there held that the inquiry was not to focus on the officer's conduct as opposed to the conduct of the accused, but rather, was to consider the actions of the law enforcement officials *as well* as the actions of the accused. The proffered instruction, however, states that the jury "must consider the conduct of the law enforcement officer *rather* than the defendant's prior disposition." This was not a correct instruction of the law, and we think the status of the law was accurately covered by AMCI 4007.

Appellants' final argument is that there was not substantial evidence to support the verdict of the jury. They say the single most important element of the crime of conspiracy is an unlawful agreement and that, in this case, the question is whether there was evidence from which reasonable men could find that Russell and Bud Sweat agreed with each other to unlawfully possess marijuana with the intent to deliver.

It is the state's position that the evidence, when viewed in the light most favorable to the appellee, *Ellis v. State*, 279 Ark. 430, 652 S.W.2d 35 (1983), is sufficient to support a finding that there was an agreement by the Sweats to commit the offense. In this regard, the state points out that the agreement does not have to be explicit but may be inferred from the facts and circumstances of the case. In *United States v. Swarek*, 656 F.2d 331 (8th Cir. 1981), the court said, "Frequently, there will be no direct evidence of the agreement," but held that "the agreement need not be formal or express and may consist of nothing more than a tacit understanding." In support of these statements, the court quoted from its decision of *United States v. Pintar*, 630 F.2d 1270, 1275 (8th Cir. 1980), as follows:

> The existence of the agreement may be shown by circumstantial evidence, including the conduct of the conspirators and any attending circumstances, particularly circumstances indicating that the defendants "acted in concert to achieve a common goal."

In our case, an undercover officer was introduced to the Sweats by Jimmy Snow. During an automobile ride with the Sweats, the officer proposed dealing in stolen property, which the Sweats declined. However, Russell Sweat brought up the possibility of dealing in marijuana and his father, Bud, invited the officer to contact them if he had any marijuana to sell. When the officer next saw Bud, the officer was asked if he was ready to go with the drug deal. Later on there was a series of conversations between the officer and Russell in an attempt to work out the details of a deal in which the officer would sell Russell a large quantity of marijuana.

On the day the Sweats were arrested, there were telephone conversations in which Russell Sweat informed the officer that he was having trouble raising money to pay for the marijuana. Bud Sweat then went to the officer's apartment and stated that the price of the marijuana was all

right and that he hated the problems that had come up about the money because "usually when *we* do business, *we* just do it." He also said that "*we* probably have $10,000 or $15,000 on hand," and by the next night could have all the money needed for the deal. Bud then offered to take the money for the marijuana to the officer on the following night, regardless of where the officer might be. As Bud left the apartment he told the officer, "By the time I get there, Russell will be back and *we* will get right with you."

Within an hour Russell called the officer's apartment and was told that his dad had been there and that they had made a deal. Russell said his dad was sitting right there beside him and had told him what the deal was, and that he would call the officer back in a few minutes. About thirty minutes later Russell came to the officer's apartment and after some discussion, reached in his pocket, pulled out some money, and was placed under arrest.

We think there was substantial evidence to justify the jury in finding that there was an agreement between Bud and Russell Sweat to purchase and distribute the marijuana and to sustain the convictions of both men.

Affirmed.

Cracraft and Cloninger, JJ., agree.

OPPOSITION

BRIEF

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-49

RUSSELL SWEAT AND
RICHARD "BUD" SWEAT ..... *Petitioners*

vs.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-49

RUSSELL SWEAT AND
RICHARD "BUD" SWEAT ..... *Petitioners*

VS.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO
THE ARKANSAS COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

QUESTION PRESENTED FOR REVIEW

WHETHER INCRIMINATING STATEMENTS TAKEN SURREPTITIOUSLY AFTER THE FILING OF AN INFORMATION BUT BEFORE ARREST AND NOT GAINED BY QUESTIONING BE USED AGAINST THE PARTY WHO MADE THOSE STATEMENTS.

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REASONS FOR DENYING THE WRIT

In support of their position the Petitioners cite *Massiah* v. *United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and *Escobedo* v. *Illinois*, 378 U.S. 47, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). In responding to this argument, the Respondent notes that the warnings mandated by *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), are not required when the person interrogated has not been arrested or deprived of his freedom in any significant way. The *Miranda* warnings need only be given when there is a custodial interrogation.

The Petitioners do not contend that anything they said before their arrest was the result of custodial interrogation. They argue that, since the original information was filed, anything they said subsequently without counsel being present should have been suppressed pursuant to *Massiah* and *Escobedo, supra*. In *Escobedo* the Court held:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment." *Gideon* v. *Wainwright*, 372 U.S. at 342, 9 L.Ed.2d at 804, 93 ALR2d 733, and that no statement elicited by the

police during the interrogation may be used against him at a criminal trial.

378 U.S. at 490, 491.

In *Massiah* the Court held inadmissible statements obtained after the petitioner has been indicted, retained a lawyer, pleaded not guilty and had been released on bail. The statements were obtained when a transmitter was placed on a co-defendant who engaged the petitioner in conversation while a federal agent listened.

The Respondent submits, recognizing that the original information had evidently been filed, that no interrogation of the Petitioners took place and that they were not coerced or tricked into saying anything against their will. In *Hoffa* v. *United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), the petitioner was involved in a jury trial in which he was charged with violating a provision of the Taft-Hartley Act. After that trial ended in a hung jury, petitioner Hoffa and three other petitioners were tried and convicted of bribing the jury. A substantial portion of the government's case was supplied by a witness who testified to several incriminating statements which he said Hoffa and another petitioner made during the course of the first trial. The petitioner argued, *inter alia*, that subsequent to a certain date in the investigation, the government had sufficient ground for taking him into custody and charging him with tampering with the jury. Had the government done so, he argued, it could not have continued to question him without observance of his Sixth Amendment right to counsel, citing *Massiah* and *Escobedo*. Therefore, he concluded, evidence of statements subsequent to that date were inadmissible because the government acquired that evidence by "flouting" his right to counsel. The Supreme Court addressed the argument as follows:

Nothing in *Massiah*, in *Escobedo*, or in any other case that has come to our attention, even remotely suggests this novel and paradoxical constitutional doctrine, and we decline to adopt it now. There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

385 U.S. at 310.

In a footnote the Court noted that it was putting to one side the problem that would have arisen if the petitioner had been arrested and charged during the progress of the first trial.

The Respondent contends that even though an information was evidently filed a few hours before the actual arrest took place, the Petitioners were in fact arrested before there was any questioning. The fact that the officers continued with the operation and allowed the Petitioners to attempt to complete the proposed deal did not violate their rights. The petitioners in *Massiah* and *Escobedo* had been arrested, were either in custody or free on bail, and had either retained counsel or requested the assistance of counsel when the incriminating statements were obtained. A case similar to the present case is *United States* v. *Ball*, 428 F.2d 26 (6th Cir. 1970), *cert. denied*, 400 U.S. 801. In *Ball* the appellants were convicted of, *inter alia*, conspiring with certain co-defendants to defraud the United States by possessing, selling and otherwise dealing in

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nontaxpaid distilled spirits. The testimony of the government's witnesses, who related their observations and dealings with each of the co-defendants, was substantially unrebutted.

The facts revealed that agents of the Alcohol, Firearms & Tobacco Division of the Treasury Department employed a woman to work in an undercover capacity at the rate of $9.00 per day plus certain expenses. Her job was to attempt to purchase nontax-paid whiskey from Appellant Ball. At the time she was hired she was instructed in the law of entrapment and told only to provide an opportunity for any of the appellants to sell her whiskey, not to persuade or induce them to engage in such unlawful transactions. At trial the government produced testimony, both photographic and oral, that another of the appellants (Ridings) was present at or about the time certain nontax-paid whiskey was unlawfully manufactured, concealed, possessed and transported. There was also evidence introduced of a conversation wherein appellant Ridings stated he had been in the liquor business a long time. In addition, there was evidence that he sold $600.00 worth of whiskey to the undercover agent.

On appeal, Ridings argued that his Fourth, Fifth and Sixth Amendment rights were violated by the admission into evidence of highly damaging admissions in his conversation with the undercover agent. The Sixth Circuit cited *Hoffa, supra*, and said:

> In the instant case, it is undisputed that appellant Ridings voluntarily approached Agent Riddle and Mrs. McCurry, that he volunteered each admission in the course of his conversation and that not until the end of the conversation did he actually request and receive payment for the delivered nontax-paid whiskey. There is no suggestion of custody or coercion so as to vitiate the voluntary nature

> of the admissions made. Further, the incomplete and continuing nature of the conspiracy was ample reasons for agent Riddle to refrain from arresting Appellant Ridings early in the conversation which would foreclose the development of further evidence of the crimes ultimately charged. — (Citing *Hoffa*)

428 F.2d at 31, 32. See, also, *United States* v. *Henry* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

CONCLUSION

Because the Petitioners were not in custody when the statements in question were videotaped, the strictures of the Sixth Amendment did not operate to prevent the use of the statements by the State. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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OPINION

SUPREME COURT OF THE UNITED STATES

RUSSELL SWEAT AND RICHARD "BUD" SWEAT v. ARKANSAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARKANSAS

No. 84-49. Decided January 14, 1985

The petition for writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

After the State of Arkansas had initiated formal criminal proceedings against the petitioners Russell and Richard ("Bud") Sweat, a state undercover agent contacted the Sweats and, in a series of telephone conversations and face-to-face meetings, deliberately elicited incriminating statements from them. Because the Sweats' right to counsel had accrued when formal criminal proceedings were begun, the prosecution's introduction at trial of these subsequent statements clearly violated the Sixth and Fourteenth Amendments. See, *e. g.*, *United States* v. *Henry*, 447 U. S. 264 (1980); *Brewer* v. *Williams*, 430 U. S. 387 (1977); *Massiah* v. *United States*, 377 U. S. 201 (1964). The Arkansas Court of Appeals held, however, that the Sweats' right to counsel had not yet attached at the time the undercover agent elicited their statements on the ground that, since they had not "been arrested or deprived of [their] freedom in any significant way," they were not entitled to notification of their rights pursuant to *Miranda* v. *Arizona*, 384 U. S. 436 (1966). 5 Ark. App. 284, 288, 635 S. W. 2d 296, 299 (1982), subsequent appeal, No. CACR 83-167 (Ark. Ct. App., Apr. 11, 1984).

This reasoning is clearly erroneous. We have made clear time and again that *Miranda* and concepts of "custody" have nothing to do with the accrual of a defendant's Sixth and Fourteenth Amendment right to counsel. See, *e. g.*, *United States* v. *Henry*, *supra*, at 273, n. 11; *Massiah* v. *United States*, *supra*, at 206. Accordingly, I respectfully dissent

from the Court's failure to correct a state court's clear disregard of controlling federal constitutional precedent.

I

During an undercover investigation in Blytheville, Arkansas, Sergeant John Chappelle of the Arkansas State Police Criminal Investigation Division learned that Bud Sweat and his son, Russell, might be engaged in marihuana trafficking. Chappelle had an unwitting intermediary introduce him to the Sweats, and he proposed to sell them several hundred pounds of marihuana. Chappelle and the Sweats had several meetings and telephone conversations from early February through late March of 1980, and they ultimately agreed that Chappelle would deliver 500 pounds of marihuana to Blytheville in exchange for $150,000. Chappelle surreptitiously taped these meetings and conversations.

When he felt that he had obtained enough evidence to prosecute the Sweats, Chappelle met on March 27 with David Burnett, Prosecuting Attorney for the Second Judicial District of the State of Arkansas. Burnett reviewed the evidence with Chappelle and decided to file a felony information against the Sweats charging them with criminal conspiracy in violation of Ark. Stat. Ann. §41–707.[1] Chappelle was present while Burnett prepared and signed the felony information. Record of First Trial in CR–80–63 and CR–80–63A (Cir. Ct., Crim. Div., Chickasawba Dist. of Miss. Cty., Ark.), p. 591 (hereinafter "First Trial Record"). Adversary judicial criminal proceedings were formally begun at 4:30 that afternoon when Burnett filed the felony information in the Circuit Court for the Chickasawba District of Missis-

[1] The felony information charged that the Sweats "did unlawfully and feloniously commit the offense of criminal conspiracy with the purpose of promoting or facilitating the commission of the criminal offense of sale and delivery or possession with intent to sell or deliver a controlled substance, to wit: marijuana, ..." Record of Second Trial in CR–80–63 and CR–80–63A (Cir. Ct., Crim. Div., Chickasawba Dist. of Miss. Cty., Ark.), p. 4.

sippi County and obtained bench warrants for the Sweats' arrest. Record of Second Trial in CR–80–63 and CR–80–63A (Cir. Ct., Crim. Div., Chickasawba Dist. of Miss. Cty., Ark.), pp. 4–6 (hereinafter "Second Trial Record").[2]

Instead of arresting the Sweats, however, Chappelle decided that he would like to elicit additional incriminating evidence from them. Accordingly, he called them on the telephone that evening and urged them to continue with the deal. First Trial Record 388–389. In subsequent calls and meetings which followed from his initiation, Chappelle probed the Sweats for details about their financial resources, their plans for the marihuana, and their knowledge of each others' activities. See generally *id.*, at 390–426. When the Sweats informed Chappelle that they could not proceed with the purchase, he outlined an alternative "recommendation" for the delivery of "good faith" money and pressed them to "let's get something going." *Id.*, at 402, 407.[3] Only after Chappelle had succeeded in eliciting these further statements from the Sweats and in persuading them to give him what little money

[2] The warrants directed the authorities: "You are commanded forthwith to arrest [Russell and Bud Sweat] and bring [them] before the Mississippi County Circuit Court, Chickasawba District, to answer an indictment in that Court against [them] for the offense of Criminal Conspiracy . . . or if the Court be adjourned for the Term, that you deliver [them] to the Jailer of Mississippi County." *Id.*, at 5–6.

[3] Specifically, Chappelle instructed Bud Sweat: "You go down to the office and you find, you gather up all you can gather and you call me back and you let me know how much. I ain't leaving here without something, understand? . . . We can do each other a lot of good. . . . But, go get me what you can as a measure of good faith and I'll take Russell's word on it and in turn I'll take your word on it. But, listen, don't jack me around, all right, cause I'm not going to do you all—." First Trial Record 400–402. In a later telephone conversation with Russell, Chappelle reiterated: "Russell, listen, I don't want to—I don't want to leave here without something. . . . Now, let's get something going. . . .I made a recommendation that your dad seemed to like and I'm sitting here waiting on an answer to that." *Id.*, at 406–409.

they could gather did he choose to execute the bench warrants. *Id.*, at 422–426.

Chappelle surreptitiously taped all of these telephone conversations and meetings, and the State sought to introduce the recordings at trial as evidence of the Sweats' statements and overt acts in furtherance of the charged conspiracy.[4] The Sweats moved to suppress the recordings of and testimony pertaining to these statements, relying on *Massiah* v. *United States*, *supra*, in support of their argument that Chappelle's deliberate elicitation of these statements after the felony information had been filed violated the Sixth and Fourteenth Amendments. Second Trial Record 35–40. The trial court, however, admitted the evidence on the ground that *Massiah* had been "further elaborated and explained" by *Miranda* v. *Arizona*, *supra*, so that the Sixth Amendment right to counsel is now implicated only when a defendant is actually in custody. First Trial Record 57. On appeal, the Arkansas Court of Appeals agreed with this reasoning:

> "[W]e note that one is not entitled to notification of his rights when the person has not been arrested or deprived of his freedom in any significant way. *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Parker* v. *State*, 258 Ark. 880, 529 S. W. 2d 860 (1975). Since no interrogation of appellants took place and they were not coerced or tricked into saying anything against their will, it was not error for the trial judge to refuse to suppress appellants' statements. See *Hoffa* v. *United States*, 385 U. S. 293 (1966)." 5 Ark. App., at 288, 635 S. W. 2d, at 299.

The Court of Appeals reversed the Sweats' convictions on other grounds, however, and remanded for a new trial.[5]

[4] The State also amended its felony information to include as substantiating details the statements and actions elicited by Chappelle after the filing of the original information. See Second Trial Record 16–17.

[5] The Sweats had argued at trial that Chappelle entrapped them, and they unsuccessfully had sought to introduce recordings of Chappelle's conversations with an informant in support of this defense. Finding that some of Chappelle's recorded statements were material to the entrapment issue, the Court of Appeals held that the trial court's refusal to admit this evidence was reversible error. 5 Ark. App. 284, 286–287, 635 S. W. 2d 296, 298 (1982).

Over renewed objection, Chappelle once again testified about his conversations with the Sweats subsequent to the initiation of formal proceedings and once again played the challenged recordings for the jury. Second Trial Record 260–286. The Sweats again were convicted of criminal conspiracy, and once again the Arkansas Court of Appeals rejected their Sixth and Fourteenth Amendment claim for the reasons stated in its earlier opinion. No. CACR 83–167 (Apr. 11, 1984). The Arkansas Supreme Court denied the motion to review.

II

The Sixth Amendment, applied to the States through the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This right to counsel accrues when "adversary judicial criminal proceedings" are initiated—"whether by way of formal charge, preliminary hearing, indictment, *information*, or arraignment." *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (emphasis added). Thereafter, the authorities may not deliberately elicit incriminating statements from the defendant absent the presence of his counsel or a knowing and voluntary waiver of his right to counsel. This prohibition applies both to express interrogation, see, *e. g.*, *Brewer* v. *Williams*, 447 U. S., at 398–401, and to surreptitious efforts by the authorities deliberately to elicit incriminating information, see, *e. g.*, *United States* v. *Henry*, 447 U. S., at 269–275 (use of jailhouse informant to elicit admissions from incarcerated defendant); *Massiah* v. *United States*, *supra*, at 206–207 (use of informant to elicit admissions from defendant who was free on bail). This touchstone requirement of our constitutional scheme embod-

ies the recognition that, once the government has "committed itself to prosecute" and the defendant thereby is "faced with the prosecutorial forces of organized society," *Kirby* v. *Illinois*, *supra*, at 689, any official effort to interrogate the defendant without the protections afforded by counsel "'contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.'" *Massiah* v. *United States*, *supra*, at 205 (quotation omitted). See also *Spano* v. *New York*, 360 U. S. 315, 325 (1959) (Douglas, J., concurring); *id.*, at 327 (Stewart, J., concurring).

Applying these principles to the circumstances of this case, it is clear that the State's introduction of the challenged recordings at trial violated the petitioners' Sixth and Fourteenth Amendment right to counsel.

First. Adversary judicial criminal proceedings began in this case with the filing of the felony information and the issuance of bench warrants at 4:30 p.m. on March 27. *Kirby* v. *Illinois*, *supra*, at 689. Although the State now attempts to minimize the fact that the felony information "evidently" had been filed before Sergeant Chappelle contacted the Sweats and elicited the challenged statements from them, Brief in Opposition 6–7, there is thus no question that at the time of these contacts the Sweats' Sixth and Fourteenth Amendment right to the assistance of counsel already had accrued.

Second. The State contends that Sergeant Chappelle merely "continued with the operation and allowed the Petitioners to complete the proposed deal," and that "the Petitioners were in fact arrested before there was any questioning." *Id.*, at 7. To the extent the State suggests that the Sixth and Fourteenth Amendments were implicated only by the "formal" questioning that occurred after the Sweats' arrest, we have repeatedly rejected such arguments. The right to counsel must "'apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse.'" *Massiah* v. *United States*, *supra*, at 206 (quotation omitted).

See also *United States* v. *Henry*, *supra*, at 272–273. The relevant inquiry has been stated variously as whether the authorities "deliberately elicited" incriminating statements from the defendant, *Massiah* v. *United States*, *supra*, at 206; or "deliberately and designedly set out to elicit information" from the defendant, *Brewer* v. *Williams*, *supra*, at 399; or "intentionally creat[ed] a situation likely to induce [the defendant] to make incriminating statements," *United States* v. *Henry*, *supra*, at 274.

There has occasionally been disagreement as to the precise formulation of the relevant standard and its application to the sometimes-ambiguous facts in cases before us. See, *e. g.*, *United States* v. *Henry*, *supra*, at 275 (POWELL, J., concurring); *id.*, at 277 (BLACKMUN, J., dissenting). Under even the most lenient application of the standard, however, there can be no question from the unambiguous facts of *this* case that Sergeant Chappelle "intentionally," "deliberately," and "designedly" elicited devastating admissions from the Sweats after formal judicial proceedings had begun. See *supra*, at —— – —— and ——, n. 3. The Arkansas Court of Appeals itself conceded that the Sweats' statements had been "elicited" by Chappelle. 5 Ark. App., at 288, 635 S. W. 2d, at 299.

Third. The State contends, however, that it is constitutionally significant that the Sweats had not yet "retained counsel or requested the assistance of counsel" when Chappelle elicited their admissions. Brief in Opposition 7. Although *Massiah* and *Williams* both involved situations in which the defendant had indeed already obtained the assistance of counsel, that factor was irrelevant to the outcome. "[T]he right to counsel . . . means at least that a person is *entitled to* the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." *Brewer* v. *Williams*, *supra*, at 398 (emphasis added). Thus we have specifically applied *Massiah* to cases in which the defendant was under indictment but where he was not represented by,

nor had he even requested, counsel. See, *e. g.*, *McLeod* v. *Ohio*, 381 U. S. 356 (1965) *(per curiam)*, summarily reversing 1 Ohio St. 2d 60, 203 N. E. 2d 349 (1964). *Cf. Edwards* v. *Arizona*, 451 U. S. 477, 484, n. 8 (1981) (discussing *McLeod*). And in *Henry*, the jailhouse informant was "contacted" by the Government six days *before* Henry obtained counsel. 447 U. S., at 266.

Fourth. The Arkansas Court of Appeals apparently believed that *Miranda* somehow modified the *Massiah* line of cases, because it viewed as dispositive the fact that, since the Sweats had not been arrested, they were not entitled to notification of their rights. 5 Ark. App., at 288, 635 S. W. 2d, at 299. The Fifth Amendment concerns embodied in *Miranda* and the Sixth Amendment right to counsel enunciated in *Massiah* are, however, obviously distinct. *Miranda* is directed at custodial interrogation and is therefore limited to those situations in which a suspect is "taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U. S., at 444. The Sixth and Fourteenth Amendment right to counsel, on the other hand, accrues upon initiation of formal judicial proceedings and continues whether or not the accused is at any given time in custody—as witnessed, of course, by the fact that Massiah himself was out on bail and engaged in a conversation with a friend who, "quite without the petitioner's knowledge," had become an undercover informant. 377 U. S., at 202. Thus we have repeatedly rejected arguments of this sort which "seek[] to infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel." *United States* v. *Henry*, *supra*, at 273.

In a similar vein, the court below contended that the Sweats "were not coerced or tricked into saying anything against their will." 5 Ark. App., at 288, 635 S. W. 2d, at 299. Although the Sweats were not "coerced" in the Fifth Amendment sense, here again the court impermissibly injected Fifth Amendment concerns into the Sixth and Fourteenth Amendment domain. We have "pointedly observed" on repeated occasions that an accused in such circumstances "was *more* seriously imposed upon because he did not know that [the person asking him questions] was a Government agent," and accordingly have rejected suggestions that we "apply a less rigorous standard under the Sixth Amendment where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be Government officers." *United States* v. *Henry*, *supra*, at 272–273 (emphasis added). See also *Massiah* v. *United States*, 377 U. S., at 206. Thus the Sweats were indeed "tricked" in the sense that "[c]onversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents." *United States* v. *Henry*, *supra*, at 273.

Finally. The State relies heavily on *Hoffa* v. *United States*, 385 U. S. 293 (1966), as support for its argument that it was entitled to proceed with its undercover sting operation until it decided to arrest the Sweats, notwithstanding that formal judicial proceedings already had been initiated. In that case, the Government arranged for an informant to monitor Hoffa's activities while Hoffa was on trial for alleged violations of the Taft-Hartley Act, a trial that ultimately ended with a hung jury. On the basis of the informant's discoveries, Hoffa subsequently was indicted for and convicted of attempting to bribe members of the first jury. Hoffa contended that the bribery charges could have been brought long before they finally were, that if they had been timely filed the informant's continued presence would have been barred under *Massiah*, and that the Government's failure to bring charges earlier therefore violated his Sixth Amendment right to counsel. The Court rejected this argument out of hand:

> "There is no constitutional right to be arrested. . . . Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." *Id.*, at 310.

Once again the State relies on precedent that is not relevant to the issue at hand. As we have previously emphasized, *Hoffa* has no bearing in cases where, as here, formal criminal proceedings actually have been initiated and the authorities deliberately elicit incriminating statements for use in *those* proceedings. *United States* v. *Henry*, *supra*, at 272. Thus while *Hoffa* stands for the proposition that the Sixth Amendment does not control the *timing* of the initiation of adversarial proceedings, it is "not relevant to the inquiry under the Sixth Amendment" *once such proceedings have commenced* and the right to counsel has attached, as it clearly had here. *Ibid.*

The State correctly notes that an investigation of criminal activities need not terminate upon the initiation of formal criminal proceedings. We have previously so emphasized. *Massiah* v. *United States*, *supra*, at 207. All that we have previously held, and all that the Court should have held today, "is that the defendant's own incriminating statements, obtained by [State] agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial." *Ibid.* (emphasis in original).

III

The press of our docket may well have led the Court to dismiss this petition for direct review as involving nothing more than an obviously aberrant failure by a State court to apply settled constitutional principles. Lest the fundamental right to counsel be blurred and then gradually eroded by the tremendous pressures put on those charged with enforcing the

criminal law, however, I believe we have a duty rigorously to correct such obvious aberrations. For "it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all." *Brewer* v. *Williams*, 430 U. S., at 406.

Accordingly, I respectfully dissent from the Court's denial of the petition for a writ of certiorari.

JUSTICE POWELL took no part in the consideration or decision of this petition.